

REMARKS

These Remarks and the accompanying Amendment are intended to reflect the substance of the 12/6/2004 telephone conference between Examiner Edwyn Labaze and Attorney Paul Rooy. As agreed in that conference, new independent claim 24 with dependant claim 25 has been added, and arguments are herewith presented for the allowability of the two original independent claims 1 and 14.

The following remarks are directed to Page 2, Par. 1 - 2 of the Office Action mailed 9/8/2004:

Noted.

The following remarks are directed to Page 2, Par. 3 – Page 4 Par. 5 of the Office Action mailed 9/8/2004:

As was discussed during the 12/6/04 telephone conference between Examiner Labaze and Attorney Rooy, numerous sites require an effective means of screening underage users. Content of these sites includes alcohol, tobacco, pharmaceutical products, adult materials, on-line gaming, etc.

One ineffective solution used in the past has been requiring credit card information, on the theory that credit cards are not issued to minors. Unfortunately this is not always true – there have been cases of credit card offers being extended to family pets! Thus, mere possession of a credit card

doesn't guaranty majority – it doesn't even guarantee the user is human. Perhaps reflecting this reality, Visa recently announced a policy prohibiting the use of its credit cards for age verification. *See Affidavit of Lawrence G. Walters in Support of Utility Patent Application 10/724,755 Par. 13.*

The reasons for denying minors access to age-restricted materials are compelling. Most important, of course, is the protection of minors. Also important, from the site operator's point of view, is avoiding the incursion of penalties for allowing minors access to age-restricted sites. One statutory example is the Child On-line Protection Act ("COPA").

Regarding Claims 2 and 14:

The two most important novel features of the instant invention which more synergistically and effectively help deny access to age-restricted sites are: 1. displaying an E-Sign Act statement on the gateway page, and 2. displaying a penalty statement on the gateway page. These two features work together as follows: the E-Sign Act allows a user to certify his or her date of birth, and to do so under penalty of perjury as provided by the penalty statement. Applicant believes this novel and ingenious procedure likely provides an affirmative defense to prosecution under COPA, because the site operator has, in good faith, restricted access by minors under reasonable measures feasible under available technology. *See instant Application page 4 lines 7 – 16 and page 5 lines 1 – 14.*

Together with the submittal of actual age verification step, the E-Sign Act statement and the penalty statement synergistically provide the following benefits not available under current gateway pages:

1. A specific legal penalty is associated with providing false information, thereby increasing the likelihood of accurate information.
2. The user's electronic signature, in accordance with the E-SIGN legislation, is included to form a binding agreement with the website operator.
3. The user's name, date and time of attempted access, and IP address are preserved for future use in the event that a dispute regarding the user's identity or age arose.
4. By submitting the age statement, a user also agrees to the website's Terms & Conditions, which are often otherwise simply included in a "browse wrap" link found elsewhere on the website, and not made part of a binding contractual agreement with the website user.
5. An actual "verification" of the user's date of birth information occurs, whereby such information is checked against the current date to calculate whether the user has reached a sufficient age so as to be entitled to access the age-restricted materials or products.
6. The interior pages of the website are blocked from access by any user who does not verify their age through the Birth Date Verifier Warning Page, so as to prevent bookmarking or deep

linking into the interior pages of the website in an effort to circumvent the age verification procedure. See Affidavit of Lawrence G. Walters in Support of Utility Patent Application 10/724,755 Par. 9.

As agreed during the 12/6/04 telephone conference between Examiner Labaze and Attorney Rooy, the instant E-Sign Act statement and penalty statement features are novel. As presented below in the Secondary Considerations section, these features are also non-obvious. Claims 2 and 14 contain both these features. Accordingly, Applicant respectfully request reconsideration and withdrawal of the rejections of claims 2 and 14, and their dependent claims.

Regarding Claim 1:

As agreed during the 12/6/04 telephone conference between Examiner Labaze and Attorney Rooy, the instant penalty statement feature is novel. As presented below in the Secondary Considerations section, this feature is also non-obvious. Claim 1 contains this feature. Accordingly, Applicant respectfully request reconsideration and withdrawal of the rejections of claims 1, and its dependent claims.

Regarding New Claims 24 and 25:

As was discussed during the 12/6/04 telephone conference between Examiner Labaze and Attorney Rooy, the instant access attempts record is distinguishable from the Umbreit '787 on-line application, because the former is an on-going record of every attempt made by a user to pass

through the gateway page, while the latter is a one-time on-line application. See Umbreit '787 Col. 4 lines 3, 4. As agreed during that conference, the combination of E-Sign Act statement, penalty statement, and attempts access record features, along with the age verification and entry of the user's name in the signature block, are novel and non-obvious. Accordingly, these limitations are claimed in new independent claim 24. Accordingly, it is anticipated new independent claim 24, and its dependent claim 25, are in condition of allowability.

The following remarks are directed to Page 4, Par. 5 – Page 5 last Par. of the Office Action mailed 9/8/2004:

Noted.

SECONDARY CONSIDERATIONS

I. Introduction.

The Court of Appeals for the Federal Circuit has elevated secondary considerations to the same level as the three factual considerations listed in *Deere*. See Uniroyal, Inc. v. Rudkin-Wiley Corp., 837 F.2d 1044, 1050, 5 U.S.P.O.2d 1434 (Fed.Cir.), cert. denied, 488 U.S. 825, 109 S.Ct. 75, 102 L.Ed.2d 51 (1988). The Court of Appeals for the Federal Circuit has held that if present, evidence rising out of secondary considerations must always be considered in nonobviousness determinations, and it is error to exclude that evidence from consideration. See Stratoflex, Inc. v.

Aeroquip Corp., 713 F.2d 1530, 1538, 1539, 218 U.S.G.Q. 871 (Fed.Cir. 1983). The Stratoflex court went further to say:

Indeed, evidence of secondary considerations may often be the most probative and cogent evidence in the record. It may often establish that an invention appearing to have been obvious in light of the prior art was not. It is to be considered as part of all the evidence, not just when the decision maker remains in doubt after reviewing the art. *See Id.*

In this case a number of secondary considerations indicate the instant invention is nonobvious. First, there has been a long-felt but unsolved need for the instant Method of Age Verification, because previous methods are legally insufficient under the Child Online Protection Act (“COPA”), have been rejected by credit card issuers such as Visa, and fail to provide the kind of evidentiary record necessary to identify the user and computer attempting to obtain access to the age-restricted materials. Second, Applicant’s sales have increased dramatically since introducing the instant invention. This record of commercial success indicates the instant invention is nonobvious. Finally, industry acquiescence towards Applicant’s invention has been demonstrated by the industry’s continued unsuccessful efforts to “design” around Applicant’s invention.

II. Long Felt But Unsolved Needs.

Long felt but unsolved needs may be relevant in the determination of nonobviousness. *See Graham v. John Deere Co.*, 383 U.S. 1, 86 S.Ct. 684, 15 L.Ed.2d 545, 148 U.S.P.Q. 459 (U.S. 1966). Firms characteristically try to increase product quality and production. *See Kitch, Graham v. John Deere Co.: New Standards for Patents*, 1966 Sup.Ct.Rev. 293, 332. If the

Applicant's innovation had been obvious, then other workers skilled in the industry would have adopted Applicant's invention earlier. Id.

There has been a long felt need for the instant Method of Age Verification. Prior to the release date of the instant Method of Age Verification, Applicant received over one hundred separate inquiries from clients and others in the Internet industry regarding the availability of a usable age verification device which could protect age-restricted materials from access unless the user verified that he or she is over a certain age. Such requests came from purveyors of adult-oriented, erotic materials, Internet gaming services, and distributors of tobacco, alcohol or pharmaceutical products that could not be legally made available to individuals under a certain age. Those webmasters seeking such a device desired to implement a Warning Page which prevented access to the interior pages of the website, where the age-restricted materials could be found or purchased, but were unsatisfied with the then-existing industry standard, whereby users would simply click a button stating "I am over 18." In addition, in his capacity as attorney specializing in constitutional law, Applicant had personal experience with judges discounting the mere age statement, which was not generally accepted in the legal community as having any legal impact or meaning in terms of age verification. See Affidavit of Lawrence G. Walters in Support of Utility Patent Application 10/724,755 Pars. 4, 20.

Internet Key, a licensee of the instant Method of Age Verification, also searched for a viable option for inline age verification, particularly for free sites or free tours/areas of paid membership sites, but could find none. Therefore, Internet Key became aware of a significant need in the industry for a device such as the instant Method of Age Verification, which need has been met by

the instant invention. *See* Affidavit of Hank Freeman in Support of Utility Patent Application 10/724,755 Pars. 4, 8.

The long-felt demand for the instant Method of Age Verification has been unmet. Applicant researched the availability of any product that would allow for immediate filtering of underage individuals to satisfy this long felt need in the Internet industry, but could identify nothing. *See* Affidavit of Lawrence G. Walters in Support of Utility Patent Application 10/724,755 Pars. 5, 20, *and* Affidavit of Hank Freeman in Support of Utility Patent Application 10/724,755 Pars. 4, 8.

Although some companies provided various forms of age verification services which issue passwords barring access to age-restricted materials upon presentation of credit card numbers, other personal information, and payment of a membership fee, no form of age verification device was available to the industry for use on free age-restricted websites, or in connection with free areas of paid membership websites. *See* Affidavit of Lawrence G. Walters in Support of Utility Patent Application 10/724,755 Par. 6. After thoroughly researching the options available for Applicant's clients in these instances, it became clear that a novel alternative would need to be invented, which thus sparked the creative desire on Applicant's part to design a workable solution. *See* Affidavit of Lawrence G. Walters in Support of Utility Patent Application 10/724,755 Par. 7.

The problem has been recognized within the industry for a long time¹, and no effective solution existed until Applicant's Method of Age Verification. If the Applicant's innovation had been obvious, then other workers skilled in the industry would have adopted Applicant's invention earlier. As explained above, they tried, but were unable to come up with Applicant's novel and non-obvious design. Therefore, the instant Method of Age Verification is not obvious because there was a long-felt unmet need for the instant invention.

III. Commercial Success

Commercial success of the invention may be relevant in the determination of nonobviousness. See Graham v. John Deere Co., 383 U.S. 1, 86 S.Ct. 684, 15 L.Ed.2d 545, 148 U.S.P.Q. 459 (U.S. 1966). A chain of four inferences underlie this test: 1. The commercial success is due to innovation; 2. If an improvement has become commercially successful, it is likely that this potential success was perceived before its development; 3. Given that the possibility for commercial success was envisioned, it is likely that efforts were made within the industry to develop the improvement; and 4. Efforts having been made within the industry, they failed because the patentee was the first to reduce his development to practice. See Kitch, Graham v. John Deere Co.: New Standards for Patents, 1966 Sup.Ct.Rev. 293, 332. These will be considered below in turn.

¹ See: *Reno v. ACLU*, 521 U.S. 844, 863, 112 S.Ct. 2329, 2340, 138 L.Ed.2d 874 (1997); *American Book Sellers Foundation for Free Expression v. Dean*, 202 F.Supp.2d 300 (D. Vt. 2002); *PSI Net, Inc. v. Chapman*, 167 F.Supp. 878 (W.D. Pa. 2001), *question certified*, 317 F.3d 413 (4th Cir. 2003); *Cyberspace Communications, Inc. v. Engler*, 142 F.Supp.2d 827 (E.D. Mich. 2001); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999); *American Libraries*

1. The commercial success is due to the innovation.

The CAFC requires a “nexus” between the commercial success and the nonobviousness. *See Windsurfing Int’l., Inc. v. AMF, Inc.*, 782 F.2d 995, 228 U.S.P.Q. 562 (Fed.Cir.), cert. denied, 477 U.S. 905, 106 S.Ct. 3275, 91 L.Ed.2d 565 (1986). In the instant case, the commercial success is caused by the instant invention, not extraneous factors, so as to form the requisite nexus between the commercial success and the invention.

The Method of Age Verification has met with considerable commercial success. It has been warmly received by Applicant’s law firm’s client base, and the industry as a whole. Use of the device is provided as a benefit of becoming a client of Applicant’s law firm, and many clients have engaged Applicant’s law firm’s services for the sole purpose of obtaining a license to use the invention on their websites. During the last year, over 75% of Applicant’s new business was acquired in whole or in part due to the instant Method of Age Verification. The number of websites using the device went from approximately 20 when first released in 2002, to over 10,000 currently, with an additional 30,000 expected to be added by 2005. This represents a growth factor of 1500 in three years. *See Affidavit of Lawrence G. Walters in Support of Utility Patent Application 10/724,755* Par. 11; 20.

Applicant’s firm’s advertising budget has remained relatively constant compared to previous years. Applicant’s firm’s number of public speaking engagements and legal works published has also remained relatively constant compared to previous years. Applicant’s firm’s market share is

Association v. Pataki, 969 F.Supp. 160 (S.D.N.Y. 1997), all recognizing the substantial difficulties in resolving the

small compared to the national adult entertainment constitutional law market – probably less than 10 %. Thus, the increase in new business is due to the merits of the instant Method of Age Verification itself, and is not due to other factors such as Applicant's firm's market share nor an advertising increase. See Affidavit of Lawrence G. Walters in Support of Utility Patent Application 10/724,755 Par. 11.

Internet Key currently uses the instant Method of Age Verification on at least 10,715 independent websites, and intends to increase that number to 36,000 by the end of 2004. The instant Method has allowed Internet Key to realize greater returns in the age verification system industry, resulting in commercial success for Internet Key. See Affidavit of Hank Freeman in Support of Utility Patent Application 10/724,755 Par. 3, 8. The commercial success enjoyed by Internet Key is directly attributable to the instant Method of Age Verification. Id. Par. 7.

Therefore, the instant invention is non-obvious, because the instant Method of Age Verification has met with considerable commercial success, and a nexus has been demonstrated between the commercial success and Applicant's invention.

2. If an improvement has become commercially successful, it is likely that this potential success was perceived before its development.

Potential success for an effective Method of Age Verification was perceived before its development. Prior to its release date, Applicant received over one hundred separate inquiries from clients and others in the Internet industry regarding the availability of a usable age

vexing problem of online age verification in the absence of face to face contact.

verification device which could protect age-restricted materials from access unless the user verified that he or she is over a certain age. See Affidavit of Lawrence G. Walters in Support of Utility Patent Application 10/724,755 Par. 4.

Internet Key also searched for a viable option for inline age verification and was aware of a significant need in the industry for a device such as the instant Method of Age Verification, which need has been met by the instant invention. See Affidavit of Hank Freeman in Support of Utility Patent Application 10/724,755 Par. 4. It became clear that a novel alternative would need to be invented, which thus sparked the creative desire on Applicant's part to design a workable solution. See Affidavit of Lawrence G. Walters in Support of Utility Patent Application 10/724,755 Par. 7.

Thus, potential success for an effective Method of Age Verification was perceived before its development.

3. Given that the possibility for commercial success was envisioned, it is likely that efforts were made within the industry to develop the improvement.

Many attempts have been made within the industry to produce an effective age verification method. Prior to the introduction of the instant Method of Age Verification, some companies provided various forms of age verification services which issue passwords allowing access to age-restricted materials upon presentation of credit card numbers, other personal information, and payment of a membership fee. See Affidavit of Hank Freeman in Support of Utility Patent Application 10/724,755 Par. 5 and Affidavit of Lawrence G. Walters in Support of Utility Patent

Application 10/724,755 Par. 6. However, no age verification device was available to the industry for use on free age-restricted websites, or in connection with free areas of paid membership websites. Id.

Thus, the problem has been recognized within the industry for a some time, and no effective solution existed until Applicant's Method of Age Verification.

4. Efforts having been made within the industry, they failed because the patentee was the first to reduce his development to practice.

The problem has been recognized within the industry for a long time, and no effective solution existed until Applicant's Method of Age Verification invention became available. *See* FN 1, *supra*, and Affidavit of Hank Freeman in Support of Utility Patent Application 10/724,755 Par.

4.

Since the introduction of the instant Method of Age Verification, a number of competitors have attempted to design around the instant Method of Age Verification. One such attempt includes the instant feature of including a statement that 28 U.S.C. (the Unsworn Declarations Act) applies, but omits the instant feature that the E-Sign Act applies. This approach doesn't work as well as the instant invention for a number of reasons. First, there is no binding agreement between the parties, because no electronic signature is provided. Absent such binding agreement, the age verification is flawed, and would be given less weight in court in any subsequent judicial proceedings and therefore less likely to be upheld as an actual statement of age. Second, because no electronic signature has been provided, there is no contract binding the user to the website

terms of service, so the user is not agreeing to the site terms and conditions. This is undesirable from the point of view of the site operator. Third, the absence of a valid signature means that no formal affidavit is created by the user, making the sworn statement essentially useless and unenforceable. See Affidavit of Lawrence G. Walters in Support of Utility Patent Application 10/724,755 Par. 12.

When the instant access attempts record is considered, a fourth disadvantage is added: the absence of any recorded user access information means users could more readily hide their identity or claim their computer was not used in attempting access. The ability to identify the user by name, date of birth, and computer used to attempt access is important from an online age verification point of view, given the relative anonymity of the internet. Id.

A second attempt to design around the instant Method of Age Verification has been to not require that an actual birth date be provided, but rather merely require the prospective user to state he or she is eighteen or older. This constitutes a mere statement of majority, not an age verification based on actual birth date. This approach also suffers from a number of flaws. First, this approach does not likely satisfy the requirements of the Child Online Protection Act, since no analysis of user age data occurs. Second, this approach does not meet industry standards within the adult internet industry nor of many online billing aggregators, which standards require actual verification, not merely a statement of majority. Third, a mere statement of majority has been rejected by the courts as an actual statement of age. See Affidavit of Lawrence G. Walters in Support of Utility Patent Application 10/724,755 Par. 13.

When the instant access attempts record is considered, a fourth disadvantage is added: the absence of any recorded user access information means users could more readily hide their identity or claim their computer was not used in attempting access. The ability to identify the user by name, date of birth, and computer used to attempt access is important from an online age verification point of view, given the relative anonymity of the internet. Id. Pars. 23, 13.

Thus, several known attempts have been made to design around the instant Method of Age Verification, but they suffer from serious flaws, as described above. See Affidavit of Lawrence G. Walters in Support of Utility Patent Application 10/724,755 Par. 14. Therefore, efforts have been made within the industry, but they failed because the Applicant was the first to reduce his development to practice.

Therefore, because: 1. Applicant's commercial success was due to innovation; 2. The potential success for was perceived by the industry before Applicant's invention; 3. Efforts were made within the industry to develop the improvement; and 4. These efforts failed because Applicant was the first to reduce his development to practice, the instant invention is non-obvious due to its commercial success.

IV. Industry Acquiescence.

Since the introduction of Applicant's Method of Age Verification, competitors have continued to attempt to find ways to improve their age verification procedures.

One such attempt, as described above, includes the instant feature of including a statement that 28 U.S.C. (the Unsworn Declarations Act) applies, but omits the instant feature that the E-Sign Act applies. This approach doesn't work as well because there is no affidavit submitted, since no electronic signature is provided. Absent an affidavit, the age verification is flawed, and would be given less weight in court in any subsequent judicial proceedings and therefore less likely to be upheld as an actual statement of age. In addition, because no electronic signature has been provided, there is no contract binding the terms of the transaction, so the user is not agreeing to the site terms and conditions. This is undesirable from the point of view of the site operator. *See Affidavit of Lawrence G. Walters in Support of Utility Patent Application 10/724,755 Par. 12.*

Another attempt to design around the instant Method of Age Verification has been to not require that an actual birth date be provided, but rather merely require the prospective user to state he or she is eighteen or older. This constitutes a mere statement of majority, not an age verification based on actual birth date. This approach also suffers from a number of flaws. First, this approach does not satisfy the requirements of the Child Online Protection Act, so it wouldn't satisfy federal law. Second, this approach does not meet industry standards within the adult internet industry, which standards require actual verification, not merely a statement of majority. Third, a mere statement of majority has been rejected by the courts as an actual statement of age. *See Affidavit of Lawrence G. Walters in Support of Utility Patent Application 10/724,755 Par. 13.*

Thus, the instant Method of Age Verification is not obvious because the industry has acquiesced to the invention, as evidenced by the continuing efforts of competitors to design around the instant invention.

V. Conclusion.

Because Applicant's Method of Age Verification fills long felt but unsolved needs within the industry, because of the commercial success of Applicant's Method, and because of the acquiescence exhibited by the industry to Applicant's invention, the instant invention is not obvious, and a patent should be issued for Applicant's Method of Age Verification.

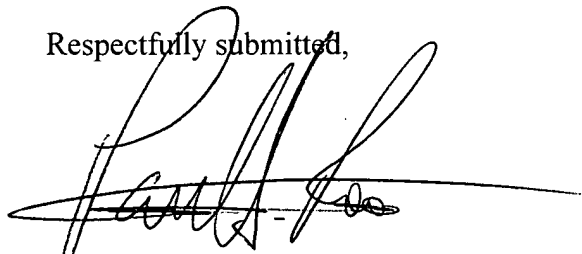
FEE FOR EXTRA CLAIMS

Enclosed herewith is a check for \$18.00 to "Commissioner for Patents" for the two extra claims (claims 24 and 25) in excess of twenty added by the adjunct Amendment.

CONCLUSION

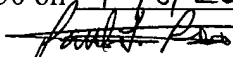
Applicant requests reconsideration and withdrawal of the rejections. Per the 12/6/04 telephone conference between Examiner Labaze and Attorney Rooy, Examiner Labaze graciously offered to call Attorney Rooy after reviewing this Amendment and Remarks to resolve any details standing in the way of approval of those claims that are substantially in condition of allowability as a result of the accompanying Amendment and Remarks.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'Paul S. Rooy', with a long horizontal flourish extending to the right.

Paul S. Rooy
Reg. No. 35,338

I hereby certify this correspondence is being deposited with the United States Postal Service as first class mail in an envelope addressed to: Commissioner for Patents, P.O. Box 1450, Alexandria VA 22213-1450 on 12/8/2004.


Signed Paul S. Rooy
Reg. No. 35,338

**AFFIDAVIT OF LAWRENCE G. WALTERS IN SUPPORT OF UTILITY
PATENT APPLICATION 10/724,755**

STATE OF FLORIDA)
COUNTY OF SEMINOLE)

1. My name is Lawrence G. Walters, I am over 18 years of age, competent to make this affidavit, and have personal knowledge of the facts contained herein. I have practiced law for over 15 years, and have focused on Internet related matters for the last 9 years.

2. I am the creator and inventor of the Birth Date Verifier method of age verification disclosed referenced in Utility Patent Application 10/724,755, pending before the United States Patent and Trademark Office, with a filing date of December 12, 2003.

3. I released the initial version of the Birth Date Verifier in late December, 2002.

4. Prior to that release date, I received over 100 separate inquires from clients and others in the Internet industry regarding the availability of a usable age verification device which could protect age-restricted materials from access unless the user verified that he or she is over a certain age. Such requests came from purveyors of adult-oriented, erotic materials, Internet gaming services, and distributors of tobacco, alcohol or pharmaceutical products that could not be legally made available to individuals under a certain age. Those webmasters seeking such a device desired to implement a Warning Page which prevented access to the interior pages of the website, where the age-restricted materials could be found or purchased, but were unsatisfied with the industry standard, whereby users would simply click a button stating "I am over 18." In addition, in my capacity as an attorney specializing in constitutional law, I had personal experience with judges discounting the mere age of majority statement, which was not generally

accepted in the legal community as having any legal impact or meaning in terms of actual online age verification.

5. I researched the availability of any product that would allow for immediate filtering of underage individuals to satisfy this long felt need in the Internet industry, but could identify nothing.

6. Although some companies provided various forms of age verification services which issue passwords barring access to age-restricted materials upon presentation of credit card numbers, other personal information, and payment of a membership fee, no form of age verification device was available to the industry for use on free age-restricted websites, or in connection with free areas of paid membership websites.

7. After thoroughly researching the options available for my clients in these instances, it became clear that a novel alternative would need to be invented, which thus sparked the creative desire on my part to design a workable solution.

8. The Birth Date Verifier incorporates elements that, based on my research, have never been assembled together, and includes new elements as well. The method of age verification allows the user to electronically submit a sworn statement of birth date, which is then verified to determine whether that sworn date of birth information makes the user over the desired age in order to gain access to the age-restricted materials.

9. This method differs significantly from the "click here if you are over 18" Warning Page in numerous respects:

a. A specific legal penalty is associated with providing false information, thereby increasing the likelihood of accurate information.

b. The user's electronic signature, in accordance with the E-SIGN legislation, is included to form a binding agreement with the website operator.

c. The user's name, date and time of attempted access, and IP address are preserved for future use in the event that a dispute regarding the user's identity or age arose.

d. By submitting the age statement, a user also agrees to the website's Terms & Conditions, which are often otherwise simply included in a "browse wrap" link found elsewhere on the website, and not made part of a binding contractual agreement with the website user.

e. An actual "verification" of the user's date of birth information occurs, whereby such information is checked against the current date to calculate whether the user has reached a sufficient age so as to be entitled to access the age-restricted materials or products.

f. The interior pages of the website are blocked from access by any user who does not verify their age through the Birth Date Verifier Warning Page, so as to prevent bookmarking or deep linking into the interior pages of the website in an effort to circumvent the age verification procedure.

10. The Birth Date Verifier method of age verification has met with commercial success. It has been warmly received by my law firm's client base, and the industry as a whole. Use of the method is provided as a benefit of becoming a client of my law firm, and many clients have engaged our services for the sole purpose of obtaining a license to use the method on their websites. During the last year, over 75% of my practice's new business was acquired in whole or in part due to the instant Method of Age Verification.

11. The number of websites using the method went from approximately 20 when first released in 2002, to over 10,000 currently, with an additional 30,000 expected to be added by

2005. This represents growth by a factor of 1500 in three years. My firm's advertising budget has remained relatively constant compared to previous years. My firm's number of public speaking engagements and legal works published has also remained relatively constant compared to previous years. My firm's market share is small compared to the national adult entertainment constitutional law market – probably less than 10%. Thus, the increase in new business is due to the merits of the instant Method of Age Verification itself, and is not due to other factors such as my firm's market share nor an advertising increase.

12. During the past year, a number of competitors have attempted to design around the instant Method of Age Verification. One such attempt includes the instant feature of including a statement that 28 U.S.C. §1746 (the Unsworn Declarations Act) applies, but omits the instant feature incorporating the E-Sign Act, and omits the creation of evidence of the user's IP address, and date/time of attempted access. This approach does not work as well as the instant invention for at least four reasons: First, there is no binding agreement between the parties, because no electronic signature is provided. Absent a binding agreement, the age verification transaction is flawed, and would be given less weight in court in any subsequent judicial proceedings and therefore less likely to be upheld as an actual statement of age. Second, because no electronic signature has been provided, there is no contract binding the user to the website's terms of service. Third, the absence of a valid signature means that no formal affidavit is created by the user, making the sworn statement essentially useless and unenforceable. Fourth, the absence of any recorded user access information decreases the effectiveness of the competitor method since users could more readily hide their identity or claim that their computer was not used in attempting access. The ability to identify the user by name, date of birth and computer used to attempt access is important from an online age verification point of view, given

the relative anonymity of the Internet. Therefore, the absence of an electronic signature dramatically reduces the effectiveness of the competitor's method, as well as the desirability of such method from the point of view of the site operator.

13. A second attempt to design around the instant Method of Age Verification has been to omit the requirement that an actual birth date be provided, but rather merely require the prospective user to provide an unsworn statement that he or she is eighteen or older. This constitutes a mere statement of majority, not a verification of age on the user's actual date of birth. This approach also suffers from a number of flaws. First, this approach does not likely satisfy the "verification" requirement of the Child Online Protection Act, since no analysis of user age data occurs. Second, this lack of age data "verification" fails to satisfy the adult Internet industry standards, along with the requirements of many third party online billing aggregators which demand more than a statement of majority before the prospective user is allowed to purchase age restricted materials using their billing services. These billing processors, and webmasters themselves, have traditionally used credit card numbers to verify age, under the theory that a user must be over 18 if he or she possesses a credit card. However, Visa has expressly prohibited the use of its credit cards as a means of age verification for age-restricted materials, thus forcing the industry to consider alternate methods. In addition, use of credit card numbers as age verification does not assist in restricting access to free materials on the Internet. Third, as noted above, the failure to record the date/time of attempted access and IP address of the computer seeking access, reduces the effectiveness of the competitor's method, from a legal standpoint. Fourth, and finally, a mere statement of majority has been rejected by the courts as a viable method of online age verification for adult restricted materials.

14. Thus, several known attempts have been made to design around the instant Method of Age Verification, but they suffer from serious flaws, as described above.

15. A small sample of the sites on which the Birth Date Verifier is currently in use can be found here: <http://www.birthdateverifier.com/sites.html>. Many other such sites exist, and thousands more will be added within the next few months.

16. The Birth Date Verifier may soon be made available to the Internet industry as a whole, in response to daily requests, and in particular the adult website and online gaming factions. The number of websites using the method is expected to skyrocket once it is made available to non-clients, on a software license subscription basis.

17. With respect to erotic materials, various state and federal statutes have been passed in an effort to require some form of age verification to protect children from inadvertent exposure to erotic materials. Complying with such laws has been particularly difficult for free websites, which do not use credit cards as a gateway to access the content. Various groups have objected to the potential for children to be accidentally exposed to adult-oriented materials while conducting online searches. However, upon implementation of the Birth Date Verifier method, search engines will be unable to access and return as results, the interior pages of a website displaying the age-restricted content. The Birth Date Verifier will block access to such pages, and instead direct the online searcher to the age statement page, which does not itself contain age-restricted materials, services or products. Therefore, the Birth Date Verifier satisfies the stated governmental interest of protecting underage Internet users from inadvertent exposure to adult-oriented materials.

18. A significant concern has developed in the online gaming industry with regard to access by minors to gaming services.¹ This industry is likewise searching for a viable age verification device that will provide a secondary check to confirm the age of the putative gambler, after the user presents credit card information or opens an account with the online casino or sportsbook.² The Birth Date Verifier would satisfy the need for such secondary check by requiring the user to submit a sworn age statement prior to accessing the online gaming services, and such double check of the user's age would satisfy the criteria used in the most recent study relating to access by minors to online gaming services.³

19. The Birth Date Verifier method of age verification has other potential applications based on inquires the undersigned has received from clients as well as potential clients. For example, the method could be implemented to prevent mainstream Internet businesses from seeking personal information from users under the age of 13, as mandated by the Child Online Privacy Protection Act, ("COPPA"). Websites could require that users complete a form of the Birth Date Verifier page, mandating that users confirm their age before questions eliciting private information could be submitted. Other potential uses involve sale of tobacco products, dispensing of medical or legal advice, purchasing and filling online prescriptions, and the distribution of other age-restricted products or services.

20. In light of the above, the undersigned can unequivocally state that there is a long-felt need for the Birth Date Verifier, and the method of age verification has met with significant commercial success.

¹ "New Research Shows that Minors Have Easy Access to Online Gambling Services," *iGamingNews.com*, (July 27, 2004), found at: <http://www.igamingnews.com/index.cfm?page=artlisting&tid=5250>.

² *Id.*

³ *Id.*

FURTHER AFFIANT SAYETH NAUGHT:

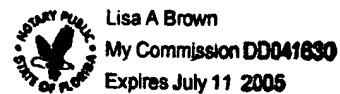

Affiant

SWORN AND SUBSCRIBED before me this 6th day of December, 2004, by Lawrence G. Walters, who did take an oath and further is personally known to me.


Notary Public

(SEAL)

Printed Name: LISA A. BROWN
My Commission Expires: 7.11.05



AFFIDAVIT OF HANK FREEMAN IN SUPPORT OF UTILITY PATENT
APPLICATION 10/724,755

STATE OF NEW JERSEY)
COUNTY OF Monmouth

BEFORE ME the undersigned authority personally appeared HANK FREEMAN, who first being duly cautioned and sworn, under oath deposes and says:

1. My name is Hank Freeman, I am over 18 years of age, competent to make this affidavit, and have personal knowledge of the facts contained herein. I am the president of Internet Key, Inc., ("Internet Key") which operates several Age Verification System ("AVS") websites including www.SexKey.com, and www.ManSites.com.

2. Internet Key has implemented the BirthDateVerifier method of age verification under a software license agreement with Lawrence G. Walters, since December, 2003, allowing Internet Key exclusive use of the device in the AVS market.

3. Internet Key currently uses the BirthDateVerifier on at least 10,715 independent websites, and intends to use it on at least 36,000 more by the end of 2004. Our exclusive license has allowed us to realize greater returns in the AVS industry, resulting in commercial success for our company.

4. Prior to licensing the device, our company searched for a viable option for online age verification, particularly for free sites or free tours / areas of paid membership sites, but could find none. Therefore, the undersigned is aware of a long felt need in the industry for a method of age verification such as the BirthDateVerifier, which has now been met.

5. Although some companies provide various forms of age verification services which issue passwords, allowing access to age-restricted materials upon presentation of credit card numbers, other personal information, and payment of a membership fee, no method of age

verification was available to the industry for use on free age-restricted websites, or in connection with free areas of paid membership websites.

6. The BirthDateVerifier method of age verification has been successfully implemented by Internet Key. It has provided a solution to a difficult problem with online age verification where there is no face-to-face contact with the user.

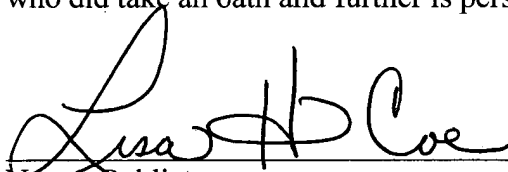
7. The BirthDateVerifier has contributed significantly to the commercial success of Internet Key, which success cannot be attributed to any other identifiable factor.

8. In light of the above, the undersigned can unequivocally state that there is a long-felt need for a product like the Birth Date Verifier, and the method of age verification has been commercially successful for our company in the AVS market.

FURTHER AFFIANT SAYETH NAUGHT:


Affiant

SWORN AND SUBSCRIBED before me this ____ day of December, 2004, by Hank Freeman, who did take an oath and further is personally known to me.


Notary Public
Printed Name: Lisa H Coe
My Commission Expires: _____

LISA H. COE
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires JULY 24, 2007

